Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00531-CV

Jimmy **ADCOCK**,
Appellant

v.

FIVE STAR RENTALS/SALES, INC.,
Appellee

From the 198th Judicial District Court, Kerr County, Texas
Trial Court No. 16480B
Honorable Rex Emerson, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: April 18, 2018

AFFIRMED

This is an appeal from an order denying a motion to compel arbitration. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (West 2011). We affirm.

BACKGROUND

Jimmy Adcock filed a workers' compensation retaliation suit against his former employer, Five Star Rentals/Sales, Inc. Before filing suit, Adcock's counsel sent a letter to Five Star inquiring about the existence of an arbitration agreement between the parties. In the letter, Adcock's counsel stated that Five Star's failure to produce an arbitration agreement within thirty days would

constitute an agreement to resolve the parties' current dispute in court and not in arbitration. When Five Star did not produce an arbitration agreement within the time specified in the letter, Adcock filed the underlying suit. Five Star answered the suit with a general denial. Adcock then propounded discovery on Five Star. Five Star responded to the discovery requests and produced copies of an employee file, which contained the original employment contract between the parties. Six months later, while reviewing the documents produced by Five Star for a deposition, Adcock's counsel found the employment contract and noticed that it contained an arbitration clause. Adcock's counsel informed Five Star that Adcock now wanted to resolve the dispute by arbitration, rather than by litigation. However, Five Star would not agree to arbitrate the dispute.

Adcock filed a motion asking the trial court to stay the litigation and to compel arbitration. In this motion, Adcock invoked the arbitration clause in the original employment contract. Five Star filed a response arguing that the motion to compel arbitration should be denied because (1) the parties had entered into a subsequent agreement to not arbitrate this dispute, and (2) Adcock had waived arbitration by substantially invoking the judicial process. The trial court held a hearing on the motion to compel arbitration, where Five Star argued against arbitration based on both of the grounds contained in its response. After the hearing, the trial court signed an order denying the motion to compel. The trial court's order did not specify the ground on which its ruling was based. Adcock appealed.

DISCUSSION

On appeal, Adcock argues the trial court erred in denying his motion to compel arbitration, pointing to the arbitration clause in the parties' original employment contract. In response, Five Star argues the trial court did not err because (1) the parties entered into a subsequent agreement to not arbitrate this case, and (2) Adcock waived the right to compel arbitration by substantially invoking the judicial process.

A party seeking to compel arbitration must first establish the existence of a valid arbitration agreement. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 524 (Tex. 2015) (citing *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) (orig. proceeding)); TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(a)(1). The trial court's determination of the existence of a valid arbitration agreement is a legal question that we review de novo. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). To determine whether a valid arbitration agreement exists, we apply ordinary contract law principles. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006); *Webster*, 128 S.W.3d at 227.

Parties who enter into arbitration agreements have the power to enter into subsequent agreements to modify or supersede their arbitration agreements. *Beldon Roofing Co. v. Sunchase IV Homeowners' Assoc., Inc.*, 494 S.W.3d 231, 242 (Tex. App.—Corpus Christi 2015, no pet.); *In re F.C. Holdings, Inc.*, 349 S.W.3d 811, 815 (Tex. App.—Tyler 2011, orig. proceeding [mand. denied]); *Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, 808 (Tex. App.—Dallas 2008, pet. denied). When parties enter into two contracts dealing with the same subject matter but do not specify in the latter contract if it is intended to discharge the former contract, courts interpret the two contracts together and, to the extent they are inconsistent, the latter contract prevails. *The Courage Co., L.L.C. v. The Chemshare Corp.*, 93 S.W.3d 323, 333 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *S.A. Dome, L.L.C. v. Maloney Dev. P'ship, Ltd.*, No 04-04-00586, 2015 WL 1398106, at *4 (Tex. App.—San Antonio June 15, 2005, no pet.) (recognizing that when parties to a contract make a valid modification of their contract, the terms of the latest contract control).

The elements needed to form a valid and binding contract are: (1) an offer; (2) an acceptance; (3) a meeting of the minds; (4) each party's consent to the terms, (5) execution and delivery, and (6) consideration. *Specialty Select Care Ctr. of San Antonio, L.L.C. v. Owen*, 499 S.W.3d 37, 43 (Tex. App.—San Antonio 2016, no pet.). When an offer prescribes the time and

manner of acceptance, compliance with those terms is required to create a contract. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *Fitzgibbon v. Hughes*, No. 04-13-00261-CV, 2014 WL 3747247, at *3 (Tex. App.—San Antonio July 30, 2014, no pet.). When one party signs a contract, the other party may accept by his acts, conduct, or acquiescence to its terms, making it binding on both parties. *Jones v. Citibank (South Dakota), N.A.*, 235 S.W.3d 333, 338 (Tex. App.—Fort Worth 2007, no pet.); *S.A. Dome*, 2005 WL 1398106, at *4. A modification of a contract must satisfy the elements of a contract: a meeting of the minds supported by consideration. *S.A. Dome*, 2005 WL 1398106, at *3 (citing *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986)).

Here, at the hearing on the motion to compel arbitration, the trial court was presented with the parties' original employment contract, which was signed on August 10, 2006, and the pre-suit letter Adcock's counsel sent to Five Star on March 31, 2016. The employment contract contemplated that any dispute between the parties would be resolved by arbitration. The pre-suit letter stated that, unless Five Star timely produced an arbitration agreement, the parties' current dispute would be resolved by litigation. Specifically, the letter stated:

> If there is a signed arbitration agreement between my client and his employer that was signed prior to his termination, please produce that to me along with the complete benefit plan so that I may make a demand for arbitration with the proper agency. If there is no arbitration agreement between you and my client, please let me know so that I may proceed with filing a suit in State Court.
>
> **If my client does not receive a copy of the signed arbitration agreement in my office within one month of receiving this request, my client will proceed with filing suit in State Court and your failure to produce any signed arbitration agreement will be your acceptance to proceed in State Court** and your waiver of enforcement of any arbitration agreement. We believe the same logic applied to employees applies to employers. Please see *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002) (an employee can accept an agreement to arbitrate merely by continuing employment, without signing any document or expressly agreeing to the arbitration). Consideration for **this agreement between you and my client** will be the fact that proceeding in State court is less expensive for you

> than paying an arbitrator and administrative fees which can easily exceed more than twenty thousand dollars.

(emphasis added). Thus, the letter informed Five Star that its failure to produce an arbitration agreement within the specified time would constitute an agreement to resolve this dispute in court and not in arbitration. It was undisputed that Five Star received the letter and did not provide Adcock's counsel a copy of the arbitration agreement within the time period specified in the letter, and that Five Star answered the suit and fully participated in the litigation. Thus, the record establishes that the parties entered into a subsequent agreement to not arbitrate this dispute.

In his briefing, Adcock argues only that the parties did not enter into an agreement to not arbitrate this dispute because Five Star was unaware of the arbitration agreement when it received the letter. We disagree. The record does not establish that Five Star was unaware of the arbitration agreement when it received the letter. Furthermore, Five Star could have accepted Adcock's offer to resolve this dispute in court regardless of whether it was aware of the arbitration clause in the employment contract.

As previously discussed, the record shows the parties entered into a second agreement to not arbitrate this dispute. Because the parties' second agreement deals with the same subject matter as the arbitration clause in the original employment contract, the second agreement—the agreement to not arbitrate this dispute—prevails. *See The Courage Co.*, 93 S.W.3d at 333; *S.A. Dome*, 2005 WL 1398106, at *4. We, therefore, conclude that Adcock failed to establish the existence of a valid arbitration agreement.

Having determined the trial court's ruling is supported on the ground that the parties entered into a subsequent agreement to not arbitrate this dispute, we need not consider whether its ruling is supported on the basis that Adcock substantially invoked the judicial process. *See Nabors Drilling USA, LP v. Carpenter*, 198 S.W.3d 240, 248 (Tex. App.—San Antonio 2006, orig.

proceeding) (recognizing that an order denying a motion to compel arbitration must be upheld if it is proper on any of the grounds considered by the trial court).

CONCLUSION

In the absence of a valid arbitration agreement, the trial court did not err in denying the motion to compel arbitration. We, therefore, affirm the trial court's order denying Adcock's motion to compel arbitration.

Karen Angelini, Justice